

# The Federal Trust Doctrine

What does it mean for DoD?

<b>Report Documentation Page</b>			Form Approved OMB No. 0704-0188	
<p>Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</p>				
1. REPORT DATE <b>01 AUG 2008</b>	2. REPORT TYPE <b>N/A</b>	3. DATES COVERED <b>-</b>		
4. TITLE AND SUBTITLE <b>The Federal Trust Doctrine</b>			5a. CONTRACT NUMBER	
			5b. GRANT NUMBER	
			5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)			5d. PROJECT NUMBER	
			5e. TASK NUMBER	
			5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>DoD Office of General Counsel</b>			8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)			10. SPONSOR/MONITOR'S ACRONYM(S)	
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release, distribution unlimited</b>				
13. SUPPLEMENTARY NOTES <b>See also ADM002111. Department of Defense Conservation Conference. Held in Savannah, Georgia on August 22-27, 2004, The original document contains color images.</b>				
14. ABSTRACT				
15. SUBJECT TERMS				
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT <b>UU</b>	18. NUMBER OF PAGES <b>16</b>
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>	19a. NAME OF RESPONSIBLE PERSON	

# Policy Overview

## ■ DoD will:

- meet its responsibilities to the tribes
- recognize tribal sovereignty
- consult before taking action
- manage its lands consistent with the protection of tribal lands, resources, and traditional cultural properties

# Consultation “Triggers”

## ■ Laws

- NHPA, ARPA, NAGPRA, NEPA

## ■ Executive Orders

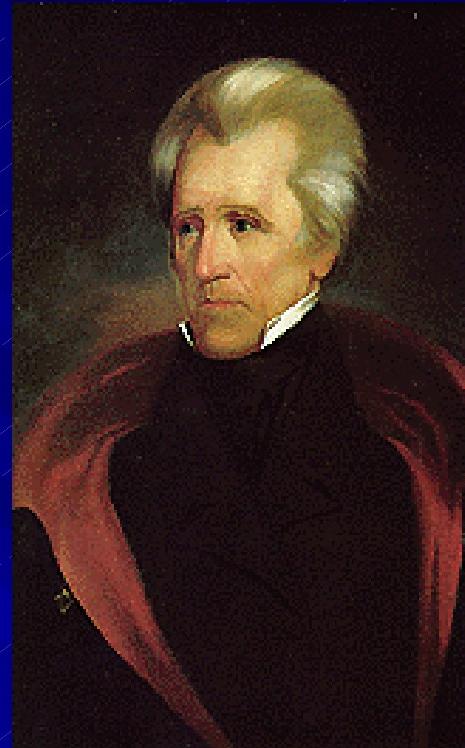
- Sacred Sites, EJ, Consultation

## ■ Federal Trust Responsibility

# The Protagonists



Chief Justice Marshall



President Jackson

# William Wirt



# Origins of the Indian Trust Responsibility

## ❖ Cherokee Nation v. Georgia (1831)

- neither states nor foreign nations
- “domestic dependent nations”
- “in a state of pupilage”
- stand as a “ward to his guardian”

# Origins of the Indian Trust Responsibility

## ❖ Worcester v. Georgia (1832)

- Tribes separate & distinct political communities
- Tribes sovereign over lands retained
- Treaties intended to ensure availability of sustainable, land-based, traditional existence
- *Duty of protection* bargained for consideration for land cessions

# The Duty of Protection

## ❖ Against what?

- Then: unrelenting pressure of immigrant intrusion
- Now: environmental and other threats to tribal lands, resources, burials, and TCPs

# Satisfying the Duty of Protection

- ❖ Narrow view:
  - U.S. owes *general* trust responsibility to Indian tribes, but...
  - Absent a specific obligation, duty is discharged by compliance with general laws and regulations not aimed at Indians
- ❖ Query: What's become of the duty?

# Satisfying the Duty of Protection

- ❖ Broader view:
  - Compliance with laws of general applicability may not be enough
  - General trust responsibility may not be enforceable, but...
  - Agency discretion in imposing greater level of protection likely to be sustained

# Exercising Discretion Consistent with the Duty

- ❖ Water diversions upriver from Pyramid Lake
- ❖ Effect of re-designating airshed on tribe's coal mining
- ❖ Coal leasing near No. Cheyenne reservation
- ❖ Navy ag out-leases and the Pyramid Lake cui-ui fishery

# Exercising Discretion Consistent with the Duty

- ❖ Emergency regulation of commercial salmon fishing
- ❖ Timber sales on former Klamath reservation
- ❖ Corps permit for fish farm in Lummi U&A
- ❖ Expansion of open-pit gold mine in Little Rocky Mountains

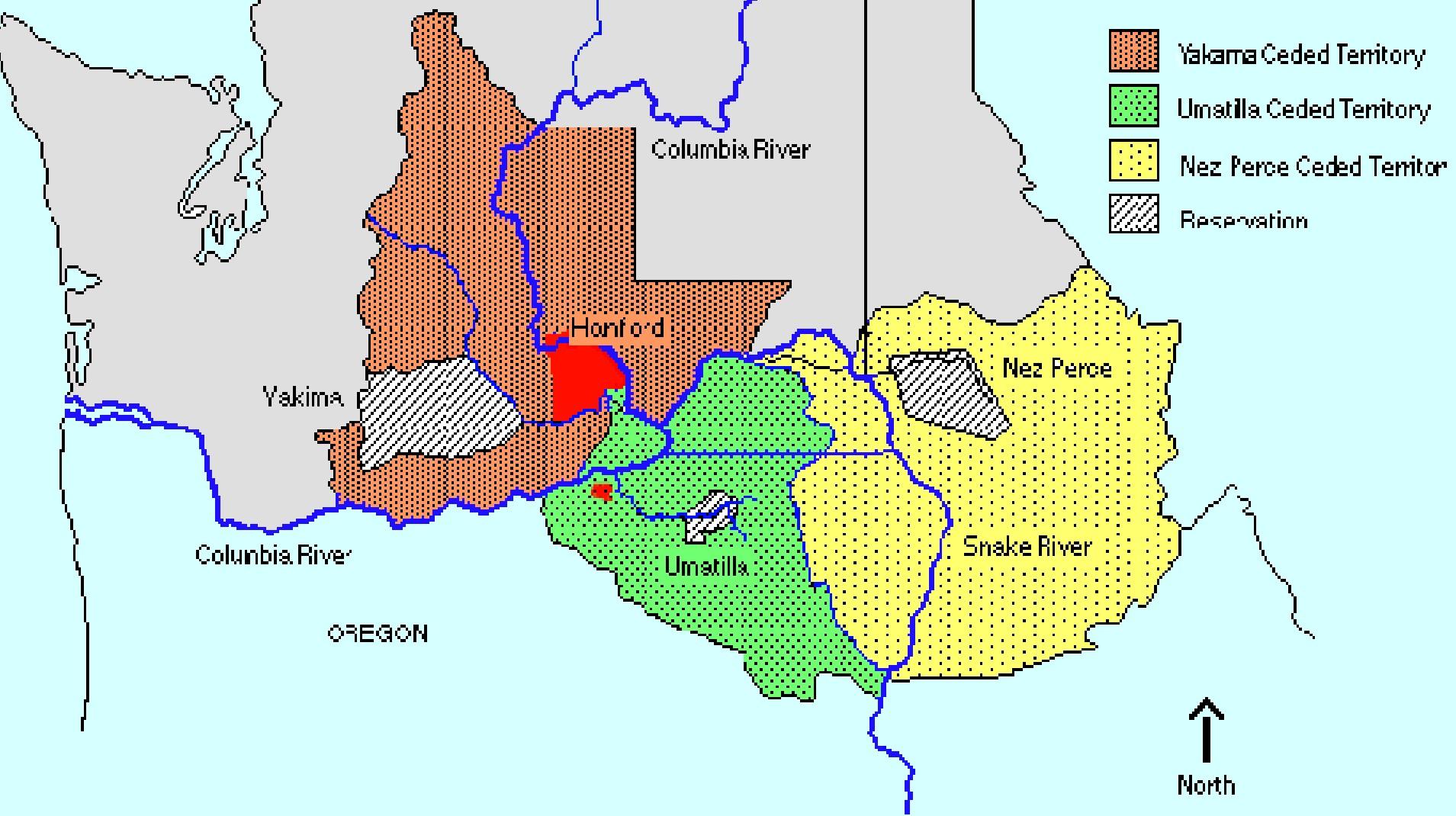


Reservation

Off-reservation reserved rights

Ceded lands

Traditional-use areas



Source: Adopted from Indian Treaty Boundaries, Portland Area Jurisdiction.  
U.S. Department of the Interior, Bureau of Indian Affairs. January 1977.

Scale

CEDED TERRITORY AND RESERVATIONS OF Affected INDIAN TRIBES

# The Upshot

- ❖ Trust responsibility shared by all federal agencies
- ❖ Obligation to consult when tribal lands, resources, or cultural properties at risk
- ❖ Duty of protection not limited to specific statutory obligations
- ❖ Agencies have broad discretion to consider duty
- ❖ Discretion exercised to protect tribal resources will be upheld

“Great nations, like great men,  
should keep their word.”

-- Justice Hugo Black